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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ALAN MALKI et al.,

Petitioners,

v.

THE SUPERIOR COURT OF
SAN BERNARDINO COUNTY,

Respondent;

KATHY LANDRY,

Real Party in Interest.

E054579

(Super.Ct.No. CIVDS911208)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. John M. Pacheco, Judge.

Petition granted in part; denied in part.

La Follette, Johnson, De Haas, Fesler & Ames, Louis H. De Haas, Christopher P. Wend;
Cole Pedroza, Curtis A. Cole and Cassidy E. Cole for Petitioners.

No appearance for Respondent.

O'Callahan for Real Party in Interest.

INTRODUCTION

This is a medical malpractice case. Real party in interest's doctor, Alan Malki (defendant and petitioner Malki), and a physician's assistant who performed one of the procedures in question, Noni McDowell (defendant and petitioner McDowell), moved for summary judgment (Code Civ. Proc., § 437c)¹ on the basis that the standard of care had, at all times, been met. Kathy Landry (plaintiff and real party in interest) responded by arguing that petitioners failed to carry their burden and, in any event, the doctrine of *res ipsa loquitur* applied and constituted a triable issue of fact. The trial court denied the motion and this petition followed.²

¹ All further statutory references are to the Code of Civil Procedure unless otherwise specified.

² Petitioners challenged the trial court's rulings on both the basic malpractice count and the count based on the failure to obtain informed consent. Because our review of the record led us to conclude that the trial court was correct in denying the motion as to the latter count, our order for preliminary response was limited to the first cause of action. This opinion is similarly limited and does not affect the ruling on the "informed consent" cause of action.

Although petitioners provided evidence that real party in interest had signed a consent form, the form does not list the specific risk of wire migration (or any specific risk), and the medical notes executed by petitioner Malki (which are hearsay) simply recite that "[t]he procedure and its risks were explained in detail." At her deposition, real party in interest testified that she was under sedation at the time petitioner Malki discussed the surgery with her and had no recollection of what was specifically discussed. As the trial court evidently correctly recognized, this was inadequate to show that real party in interest was informed of the *specific* risk of wire migration. In a declaration attached to the motion, Douglas McConnell, M.D., stated his "opinion," that informed consent was obtained. This opinion is not supported by the written record. Where the record is blank, an expert may not fill it in with guesses disguised as "opinion." At oral argument, it was pointed out that Dr. Malki testified at his deposition that he was unaware of the risk of wire migration. In that case, he can hardly have been assumed to have warned plaintiff of that risk.

STATEMENT OF FACTS

The facts critical to our analysis are not in dispute. Real party in interest presented with severe cardiac symptoms and petitioner Malki performed a triple coronary artery bypass graft. As part of the procedure, he sutured an electrode to real party in interest's heart to promote postoperative pacing. The electrode was connected to pacing wires, which extended outside her body and were connected to a generator. "Pacing" of the heart was successfully conducted on several occasions following the surgery. As real party in interest's postoperative condition improved and just prior to her discharge from the hospital, petitioner McDowell snipped off the wires at skin surface level. The free ends of the wires then retracted into the skin.

Real party in interest continued to have cardiac complaints and some three years later it was discovered that two fragments of wire, apparently from the pacing wires, had migrated into the heart. She attributes her cardiac issues following petitioner Malki's surgery to the presence of the wires.

The primary support for petitioners' motion was the declaration of Dr. McConnell, who is board certified in cardiothoracic surgery. In addition to the general opinion that petitioners' care fell "well" within the standard of care for a cardiothoracic surgeon and physician's assistant in the community, he specifically stated that the decision to leave the sutured wires attached to the atrial wall of the heart, rather than to remove them entirely, was appropriate and "consistent with the applicable standard of care." He also stated that "[i]t is my medical opinion that the free end of an atrial pacing wire[s] can migrate into anatomical areas and locations other than those that were intended by the doctor placing the wire[s]. Such migration can occur in rare cases, and did

in this case, without regard for any act or omission on the part of the treating physician or surgeon, or physician's assistant.”

In response, real party in interest presented legal argument and evidentiary objections to Dr. McConnell's declaration, but did *not* present any expert evidence of her own. One of her objections challenged Dr. McConnell's opinion quoted *ante* on the ground that it “lacks foundation and calls for speculation” because Dr. McConnell did “not proffer any theory for why he believes the subject wire migrated or what acts of [petitioners] demonstrate that they were not responsible for such migration.” The trial court agreed with this and struck that portion of Dr. McConnell's declaration.³ It then denied petitioners' motion for summary judgment. As we will explain, we believe both rulings were in error.

DISCUSSION⁴

The first point to consider is what standard of review should be applied. As real party in interest argued at oral argument, in many instances evidentiary rulings are reviewed under the relatively broad standard of abuse of discretion. (See, e.g., *People v. Jones* (2011) 51 Cal.4th 346, 375-376; *People v. Stanphill* (2009) 170 Cal.App.4th 61, 73.) In some circumstances, however, even quasi-factual determinations are reviewed *de novo*. (See, e.g.,

³ At oral argument, some question was raised over whether or not the trial court in fact sustained the objection to paragraph 54. Although the minute order omits any such ruling, the trial court's tentative ruling evidently indicated an intention to sustain the objection and at the hearing it orally confirmed this. We think the point is established.

⁴ At oral argument, the question was bandied about as to whether Dr. McConnell's statements in other respects accepted by the trial court were sufficient to shift the burden to plaintiff to produce evidence of negligence. We conclude that they were not because when the doctrine of *res ipsa loquitur* applies, it acts as a *substitute* for evidence of negligence. That is, Evidence Code section 646 expressly permits the jury to *infer* negligence from the facts that support the application of the doctrine.

People v. Holloway (2004) 33 Cal.4th 96, 114.) We need not resolve the question here. Even under the more deferential standard, the trial court's insistence that Dr. McConnell explain "why and how" the wires migrated was unreasonable and constituted an abuse of discretion.

Dr. McConnell gave the opinion that it was within the standard of care to leave the wires inside the patient's body with the ends clipped off flush to the skin. He then stated that in rare cases the loose ends move around within the tissues. In our view, the trial court asked too much when it took the position that Dr. McConnell's statements were *inadmissible* unless he explained "how" the wires migrated. Even if his explanation had been simply "they just do,"⁵ this would not invalidate his statement of a medical/surgical fact or make it inadmissible. The *mechanism* of the migration is not critical, or even relevant, to the *fact* of random migration into other tissues. (See *Curtis v. Santa Clara Valley Medical Center* (2003) 110 Cal.App.4th 796, 802 (*Curtis*) [plaintiff, seeking to rely on res ipsa loquitur, acknowledged the cause of the harmful result was not known].) The trial court's ruling, if extended to its logical conclusion, would prohibit a defendant from establishing that res ipsa loquitur does not apply whenever expert or scientific knowledge of the specific causative factor is absent. However, and paradoxically, it would not, presumably, not prevent a *plaintiff* from arguing that "whatever the actual causative mechanism is, the result would not occur without negligence."⁶

⁵ We are not sure that a more scientific, detailed explanation would have added much, if anything, to the value of Dr. McConnell's declaration as the underlying medical issues would of necessity have been beyond the experience of a lay person.

⁶ In the classic case described in footnote 11, *post*, it seems unlikely that the factual reason for the barrel's breakout and fall was known. The plaintiff must therefore have relied on res ipsa loquitur without having been required to show *how* the barrel actually came loose and rolled away.

Real party in interest argues here that Dr. McConnell did not state that he had personal experience of wire migration, or that it was reported in the literature, and asserts that his “medical opinion” was therefore without foundation. However, Dr. McConnell’s declaration describes his own “extensive experience in both performing coronary artery bypass grafting surgery and, thereafter, post-operatively managing individuals like the [real party in interest] . . . both with and without the necessity of placing epicardial pacing wires.” The only logical inference is that his “medical opinion” is based upon his “extensive experience” and the ongoing education and study implicit in his maintenance of board certification.

We are familiar with authorities, which criticize, and even reject, expert medical declarations that do not recite in detail the reasoning and/or facts behind the opinion. (See, e.g., *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524 (*Kelley*)). However, we agree with the view that “excruciating” detail is not required. (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 608, fn. 6 (*Hanson/Grode*)). The value of such detail in a declaration supporting a motion for summary judgment is particularly limited because there will be no cross-examination and, therefore, any details provided cannot be attacked, undermined, or refuted. Furthermore, it is the nature of the beast that medical detail is unlikely to assist the trial court in evaluating the declaration; it is more likely to induce sleep than insight. It is also to be noted that Dr. McConnell’s statement with respect to the possibility that atrial wires left in the thoracic tissue sometimes migrate into other tissues is one of medical *fact*, not opinion; such factual testimony on arcane subjects is perfectly proper. (See, e.g., *People v. Powers-Monachello* (2010) 189 Cal.App.4th 400, 412-413.)

Plaintiff argues that we should apply cases such as *Kelley* and *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108 (*Jennings*) as properly giving a strict construction to evidence supporting a motion for summary judgment and a liberal construction to evidence opposing such a motion.⁷ We are, of course, familiar with this rule. (See *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1368.) But a careful examination of these cases demonstrates the difference between a competent affidavit that cannot be disregarded and an affidavit that is hopelessly speculative or unsupported.

In *Kelley*, first of all, the court's comments on the nature of "foundation" from the expert were dicta, as the court candidly admits. (*Kelley, supra*, 66 Cal.App.4th 519.)⁸ More importantly for our purposes, the expert's declaration, dismissively described by the court as a "page-and-a-half long" and containing three paragraphs of discussion (*id.* at p. 524), merely recited the contacts between plaintiff and defendant doctor, and then concluded that the doctor performed competently. But this conclusion was illogical even from a lay perspective in the absence of further explanation. The plaintiff in that case suffered a laceration to his arm and was treated at an emergency room. The next day he was in extreme pain, which was reported to defendant, who was acting for plaintiff's primary care physician, the latter then on vacation. Defendant indicated that plaintiff should wait until his own doctor returned in a few days. Defendant gave the same nonresponse when plaintiff contacted him a second time, again

⁷ Of course, in this case, there was no opposing evidence to be liberally construed.

⁸ The court acknowledged that any such defect had been waived by the plaintiff. In fact, the brief discussion was doubly dicta because the court also found that the plaintiff's opposing evidence was sufficient to raise a triable issue of fact "even if [defendant's expert's] opinion standing alone had been sufficient to support summary judgment." (*Kelley, supra*, 66 Cal.App.4th at p. 524.)

complaining of severe pain. (*Id.* at p. 521.) The theory at trial was that the delay in treatment caused plaintiff to suffer permanent injuries from compartmental syndrome.

Among the critical defects in the expert's declaration, as noted by the Court of Appeal, was that it failed to address the possible causes—benign or sinister—of plaintiff's continuing severe pain. (*Kelley, supra*, 66 Cal.App.4th at p. 524.) Even a lay person would find it hard to believe that such symptoms might not be the reflection of an unusual and potentially serious complication of a simple laceration. In that context, the expert's blithe implication that defendant doctor had no obligation even to make further inquiries of plaintiff flew in the face of common sense.

Jennings is, if anything, even worse and a good example of an expert attempting to hide ignorance with speculation. In that case, a retractor was left in the patient's abdomen. When surgeons performed a second operation to remove it, they found that the retractor had been encased in the omentum, a specialized tissue designed to encase foreign bodies or inflammation and release killer cells. The surgeons *also* found a serious subcutaneous infection along part of the surgical incision. However, the infection was separated from the retractor by several physiological structures—the peritoneal wall, fascia, and muscle layers. There was no visible inflammation or infection around the retractor itself. (*Jennings, supra*, 114 Cal.App.4th at pp. 1112-1114.)

The plaintiff's expert proposed to testify⁹ that the retractor, arguably contaminated at the time it was left in the incision, caused the subcutaneous infection. However, he could not provide any medical explanation for the supposed migration of the bacteria from the retractor to the infection site. Instead, he simply stated, “[i]t just sort of makes sense.” (*Jennings, supra*, 114 Cal.App.4th at pp. 1115-1116, 1120.)

The difference between *Jennings* and this case is that in *Jennings*, as in *Kelley*, the expert's opinion did *not* make sense because the expert could not “connect the dots” to show causation, and his opinion was without factual foundation. The medical facts recited in the opinion reflect that the retractor, when removed, had been encased in protective tissue. Nothing indicates that there was any “trail” of infection to the main infection site, which was physiologically sealed off from the area where the retractor was found. As the appellate court commented, the expert nevertheless drew an “ipso facto” conclusion (*Jennings, supra*, 114 Cal.App.4th at p. 1115), which did not at all derive logically from the medical/physical facts.

We have no quarrel whatsoever with the results in these cases.¹⁰ Here, however, the statement that migration of atrial wires occurs in the absence of negligence does not depend on any detailed explanation of how migration occurs. Petitioners were not attempting to

⁹ The trial court excluded the evidence. (*Jennings, supra*, 114 Cal.App.4th at pp. 1114-1115.)

¹⁰ Plaintiff also relies upon *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, a rather peculiar case that applied the “strict/liberal construction” dichotomy to find that an opposing expert's declaration was sufficient to create a “triable issue of fact” even though to some extent it was, as the court admitted, based upon assumptions unsupported by the record. It is of marginal usefulness to plaintiff, who did not submit any opposing affidavit that we could construe one way or the other. To the extent that it reconciles *Kelley* and *Hanson/Grode* as examples of the “strict/liberal” dichotomy, it does not assist plaintiff for the reasons explained in the body of this opinion.

affirmatively establish the element of causation, but merely to show that the result “just happens” even if no one knows why. Nor were they attempting to establish *lack of negligence*, but only that application of *res ipsa loquitur* was inappropriate. Nor is there anything in Dr. McConnell’s declaration that could reasonably be viewed with skepticism by an informed layperson, quite unlike the dubious assertions in the declarations submitted in *Kelley* and *Jennings*.

We are therefore persuaded that Dr. McConnell’s evidence that migration of atrial wires into unexpected and undesired areas is a random event unrelated to any error on the part of medical personnel was adequate to carry petitioners’ burden, accompanied as it was by his overall opinion that petitioners met the applicable standard of care.

The next question is whether real party in interest could nevertheless rely on *res ipsa loquitur* to prevent the rendition of a summary judgment in petitioners’ favor. We conclude that she could not because the application of the doctrine in this malpractice case is itself an issue requiring expert testimony.

In a medical malpractice case, the general rule is that the testimony of an expert witness is required to establish the standard of care, whether the standard was breached, and whether any negligence caused injury. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001; *Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1542.) In the context of summary judgment, that means if a defendant medical professional presents evidence sufficient to establish that he or she met the standard of care, the plaintiff *must* counter with expert rebuttal. (See *Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 843-844.) As we have discussed *ante*, real party in interest marshaled no such evidence, relying in part on the attack on Dr. McConnell,

which we have found to be misdirected. Hence, there was no rebuttal evidence to the effect that petitioners' conduct breached their duty of care.

However, the well-known exception to the rule requiring expert testimony in a medical malpractice case applies where the injury-causing mechanism can be properly evaluated by a layperson. (*Landeros v. Flood* (1976) 17 Cal.3d 399, 410.) This exception principally comes into play when a plaintiff, as here, attempts to rely on the doctrine of *res ipsa loquitur*¹¹ to establish a presumption of negligence. (Evid. Code, § 646; *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 826.) Although the statute does not define the doctrine, California applies the traditional common-law rule. *Res ipsa loquitur* will substitute for other evidence of negligence when three factors are present: (1) the accident must be of a kind that does not occur unless someone is negligent; (2) the accident must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the accident must not have been due to any voluntary action or contributory fault of the plaintiff. (*Brown v. Poway Unified School Dist.*, at pp. 825-826; *Baumgardner v. Yusuf* (2006) 144 Cal.App.4th 1381, 1389.) In this case, the only disputed element is the first, as petitioners do not, for the purposes of the motion and this

¹¹ “““In the year 1863 a barrel of flour rolled out of the window of an English warehouse and into the lives of all tort lawyers. It fell upon a passing pedestrian, who sued the owner of the warehouse for his injuries. At the trial, a question arose as to the necessity of some affirmative proof of the defendant's negligence; and in the course of a brief colloquy with counsel, Baron Pollack made use of a familiar and homely phrase. He said, 'The thing speaks for itself.' Unfortunately, since he was a classical scholar in the best tradition of English judges, he said it in Latin.””” (Curtis, *supra*, 110 Cal.App.4th at p. 801, fn. 2, quoting from Prosser, *Res Ipsa Loquitur in California* (1949) 37 Cal.L.Rev. 183.)

petition, assert that either a third party or real party in interest bears some responsibility for the claimed injury.¹²

Because medical issues are frequently outside the common understanding of a lay judge or juror, expert evidence may also be necessary to establish whether or not *res ipsa loquitur* should be applied in a professional negligence case. In *Curtis, supra*, 110 Cal.App.4th 796, the plaintiff, a paraplegic due to an automobile accident, underwent surgery to stabilize his spine. Because it was necessary to place him in a prone position, his face rested on a foam pillow with cutouts for his eyes and nose to reduce pressure on these structures. After the surgery, it was discovered that the plaintiff had suffered substantial and permanent visual impairments. (*Id.* at pp. 798-799.) The plaintiff eventually elected to withdraw his retained experts and relied on a theory of *res ipsa loquitur*.¹³ The trial court granted petitioners' motion for nonsuit. (*Id.* at pp. 799-800.)

The Court of Appeal held that the ruling was correct because “[g]iven the complexity of the procedure, and the evidence presented, there was no basis within common knowledge for a layperson to conclude that [plaintiff’s] blindness, sustained as a result of a posterior spinal fusion, was the result of negligence. Thus . . . ‘*expert testimony was necessary to determine whether a probability of negligence appears from the happening of an accident or untoward*

¹² Petitioners do argue that real party in interest failed to present any evidence of any or *all* of the three elements. However, in our view, in the posture of this case, it would have been sufficient for real party in interest to provide evidence that the injury does *not* occur in the absence of negligence in order to avoid summary judgment, as the other elements function more as rebuttal. Furthermore, petitioners presented no affirmative evidence showing that others might be responsible or that real party in interest contributed to the injury.

¹³ As *Curtis* went to trial, the plaintiff had the burden of proof. Here, of course, petitioners had the initial burden to establish their defense.

result.”¹⁴ (*Curtis, supra*, 110 Cal.App.4th at p. 803, italics added.) The court noted that cases applying *res ipsa loquitur*, in the medical context, include situations where scissors or other instruments are left internally after surgery (*Leonard v. Watsonville Community Hosp.* (1956) 47 Cal.2d 509, 514)¹⁵ or the plaintiff suffers an injury to a body part completely unrelated to the surgery or any normal procedures (*Ybarra v. Spangard* (1944) 25 Cal.2d 486, 488-489 [injury to shoulder following routine appendectomy]). In such a situation, the lay trier of fact can use his or her life experience to conclude that “some one had blunder’d.”¹⁶ By contrast, when an injury occurs from occult medical or physiological processes, the layperson is *not* qualified to decide without expert assistance whether there was a negligent cause of the injury. (See *Folk v. Kilk* (1975) 53 Cal.App.3d 176, 185-186 [plaintiff suffered a brain abscess following a tonsillectomy; *res ipsa loquitur* instruction *improper*].)

The logic of *Curtis* is directly applicable to this case. Real party in interest underwent a complex medical/surgical procedure, which included the attachment of electrodes to her heart. The electrodes in turn were attached by wires to an externally located generator. Once the wires were nipped at skin level, by some unknown mechanism, one or more of them, or a portion

¹⁴ The opinion in *Curtis* reflects that in that case, as here, there was testimony that the unfortunate result could occur in the absence of negligence and that the cause was not known. (*Curtis, supra*, 110 Cal.App.4th at pp. 802-803.) (It is not clear how this testimony came before the court, as the case was resolved by the granting of a motion for nonsuit, which comes, at the latest, at the end of the *plaintiff's* evidence. (§ 581c, subd. (a).)) However, this supports our conclusion that the fact that the mechanism of injury is not described, or cannot be described, does not invalidate the opinion that it need not be the result of negligence.

¹⁵ See *Baumgardner v. Yusuf, supra*, 144 Cal.App.4th 1381, 1387 (sponge-left-behind case).

¹⁶ Alfred, Lord Tennyson, “The Charge of the Light Brigade,” verse two, line four.

thereof, moved through the tissues to penetrate the heart. Whether such an accident could happen in the absence of negligence is very far from the understanding or experience of the lay person, and a classic example of a case in which expert evidence is necessary to explain whether the application of *res ipsa loquitur* is appropriate.

Independent of the summary judgment rules limiting credibility determinations (§ 437c, subd. (e)), when expert evidence is required in a medical negligence case, that evidence is *conclusive* and cannot be disregarded. (*Flowers v. Torrance Memorial Hospital Medical Center, supra*, 8 Cal.4th at p. 1001, cited on the point in *Elcome v. Chin* (2003) 110 Cal.App.4th 310, 317.) As real party in interest failed to provide evidence in contradiction to that of Dr. McConnell, the trial court was required to credit it.

Although it is often said that summary judgment is a drastic remedy and should be granted with caution (*Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 352), it must be remembered that the purpose of the statute is to weed out meritless cases and avoid needless litigation to the trial stage. (*Cole v. California Ins. Guarantee Assn.* (2004) 122 Cal.App.4th 552, 556.) Apparently, at least at this stage of the litigation, real party in interest does not intend to attempt to affirmatively establish negligence on the part of petitioners. As for her attempt to rely on *res ipsa loquitur* as a substitute for proof of negligence, if she cannot find an expert who will declare that, “No, migration of atrial wires is *not* a rare but known complication that occurs in the absence of negligence; it is most probably due to negligent [fill in a medical explanation here],” then there seems little point in allowing the lawsuit to continue based on an overzealous scrutiny of the moving party’s supporting declarations.

We have explained that Dr. McConnell's statements, including those stricken by the trial court, were admissible evidence. If the trial court's decision was based on the belief that Dr. McConnell's opinion was not credible (as distinguished from inadmissible), it was erroneous, as we have also explained. When Dr. McConnell's opinion is given its proper weight, it is sufficient to establish that both petitioners met the standard of care, and *res ipsa loquitur* does not apply to this case. The burden thus shifted to real party in interest to provide countervailing evidence on either of these points. (§ 437c, subd. (p)(2); *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 169.) As she failed to do so, petitioners are entitled to summary adjudication of the negligent treatment cause of action.

DISPOSITION

The petition for writ of mandate is granted in part. Let a peremptory writ of mandate issue, directing the Superior Court of San Bernardino County to vacate its order denying summary adjudication of count one of real party in interest's complaint, and to enter a new order granting summary adjudication as to that count. In all other respects the petition is denied.

Petitioners are directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

In the interests of justice, each party shall bear their own costs. The previously ordered stay is lifted.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

KING
J.